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6 **UNITED STATES DISTRICT COURT**
7
DISTRICT OF ARIZONA

8 United States of America,
9 Plaintiff,
10 v.
11 Abdul Malik Abdul Kareem,
12 Defendant.

2:15-cr-00707-SRB

**Motion to Preclude
Government *Ex Parte*
Submission Under CIPA Absent
Defense Participation**

13 Defendant Abdul Malik Abdul Kareem moves the Court to preclude the
14 government from making an ex parte submission under the Classified Information
15 Procedures Act, 18 U.S.C. § App. 3, (“CIPA”) unless the Court also permits the defense
16 to participate in the Court’s evaluation whether the information should be
17 produced, and the nature and extent of any redactions permitted.

18 Excludable delay under 18 U.S.C. § 3161(h) will not occur as a result of this
19 notice or an order based thereon.

20 Respectfully Submitted this 15th day of January 2019.
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22 DRAKE LAW, PLC
23
24 *s/Daniel R. Drake*
DANIEL R. DRAKE
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MEMORANDUM

2 Twice the government has made use of CIPA procedures to disclose to the
3 Court in *ex parte* fashion information that it does not wish to disclose to the
4 defense. Docs. 193 and 405. The first such disclosure was prior to trial, the second
5 in connection with a defense motion for new trial in which additional disclosures
6 were made.

7 Now, a supplemental motion for new trial is pending based upon comments
8 of government counsel, testimony of government witnesses, and government
9 disclosures in connection with the trial of Erick Jamal Hendricks in the Northern
10 District of Ohio, Case. 1:16-cr-00255-JRA, concluded in March 2018. The FBI
11 undercover agent who was communicating with Kareem's co-defendant, Elton
12 Simpson, was communicating with Hendricks as well, and testified at Hendricks
13 trial. His testimony and government counsel comments prompted the filing of the
14 supplemental motion for new trial. (Doc. 505.)

15 After the defense filed its June 11, 2018, supplemental motion for new trial
16 the prosecution disclosed about 30 pages of materials apparently related to the
17 undercover agent's communications with other FBI agents in the run-up to the
18 May 3, 2015 shooting, as well as an internal review of the shooting in Garland,
19 Texas, conducted by the FBI after the fact.

20 Defense counsel requested in a September 6, 2018 letter that the
21 government provide additional information based upon those disclosures. The
22 government indicated January 11, 2019, that it might make a response to the
23 disclosure request this week. Defense counsel anticipates the government may
24 wish to make an *ex parte* submission to the Court, as it has in the past, to justify
25 withholding certain information on the ground it is not relevant and material to
26 the defense.

27 The defense hereby lodges its objection to such a procedure and moves the

1 Court to permit it to participate in sharing information with the Court. The
2 defense believes it is in the best position to articulate aspects of the defense that
3 might lead the Court to conclude some or all of the information is both relevant
4 and material to the defense, such that it should be disclosed.

5 The Supreme Court has recognized that “[f]airness can rarely be obtained by
6 secret, one-sided determination of facts decisive of rights.” *United States v. James*
7 *Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993) (citation omitted). And, it has
8 warned that “[i]n our adversary system, it is enough for judges to judge. The
9 determination of what may be useful to the defense can properly and effectively be
10 made only by an advocate.” *Dennis v. United States*, 384 U.S. 855, 875 (1966). The
11 Court took a similar position in *Jencks v. United States*, 353 U.S. 657, 668 (1957),
12 holding “[t]he practice of producing government documents to the trial judge for
13 his determination of relevancy and materiality, without hearing the accused, is
14 disapproved.” *Id.* It was that case, of course, which led to the passage of the
15 “Jencks Act, 18 U.S.C. § 3500.” It is rarely justifiable for the prosecution to have
16 exclusive access to a storehouse of relevant facts, Dennis, 384 U.S. at 873, but the
17 procedures of making an *ex parte* submission to the district court, without any
18 defense input, creates precisely that situation.

19 The defense proposes a solution along the lines followed by the district
20 court in *United States v. Libby*, 429 F. Supp. 2d 18, 26. (DC D.C. 2006), amended 429
21 F. Supp. 46, 48 (DC D.C. 2006). There, the district court permitted the defense to
22 submit *ex parte* information to aid the court’s determination of the
23 appropriateness of non-disclosure or redaction. The defense would request that,
24 rather than a written submission, it be permitted to make an *ex parte* oral
25 presentation *in camera* to the Court regarding its need for the requested
26 information.

27 Counsel recognizes this motion might be premature as the government has
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1 not given notice that it intends to submit materials *ex parte*. However, better to be
2 premature in this instance than tardy. Should the government make no such
3 submission this motion will be moot.

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5 CONCLUSION

6 For the foregoing reasons, this Court should preclude the government from
7 making an ex parte submission under the Classified Information Procedures Act
8 unless it also grants the defense an opportunity to make an ex parte submission to
9 aid the Court in determining the appropriateness of nondisclosure or redaction of
10 information.

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12 Respectfully Submitted,

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14 MAYNARD CRONIN ERICKSON

DRAKE LAW, PLC

15 CURAN & REITER, P.L.C.

16 *s/Daniel D. Maynard*

s/Daniel R. Drake

17 DANIEL D. MAYNARD

DANIEL R. DRAKE

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Certificate of Service

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25 I hereby certify that on January 15, 2019, I electronically transmitted the
attached document to the Clerk's Office using the CM/ECF System for filing and
transmittal of a Notice of Electronic Filing to CM/ECF registrants:

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AUSA Joseph E. Koehler
AUSA Kristen Brook

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